(1)

Supreme Court, U.S.
FILED

96 212 AUG 6 1996

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

In re: David L. Smith

PETITION FOR A WRIT OF CERTIORARI

DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

PRO SE ATTORNEY-PETITIONER

28 pp

QUESTIONS PRESENTED FOR REVIEW

Whether by disbarring Mr. Smith from the practice of law in the Tenth Circuit without giving him the evidentiary hearing required by Fed. R. App. P. 46, the disciplinary panel deprived him of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, without due process of law.

Whether the disciplinary panel also so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . . i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION AND RULE OF PROCEDURE INVOLVED IN THE CASE 2

STATEMENT OF THE CASE 4

ARGUMENT 6

CONCLUSION 8

APPENDIX . . . . . Attached

TABLE OF AUTHORITIES

CASES

Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987) 7

Cleveland Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) 7

In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) 6

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) 6

Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985) 7

Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir. 1984), cert. denied, 471 U.S. 1016 (1985) 7

White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990) 7

Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) 6

STATUTE

28 U.S.C. § 1254 2

OTHER AUTHORITIES

Amend. 5, U.S. Consti. 2

Fed. R. App. P. 46 3

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

In re: David L. Smith

PETITION FOR A WRIT OF CERTIORARI

David L. Smith hereby files his Petition for a Writ of Certiorari:

OPINIONS BELOW

Order issued by a three-judge disciplinary panel of the United States Court of Appeals for the Tenth Circuit on February 13, 1996 disbarring Mr. Smith from the practice of law in the Tenth Circuit.

Order issued by the Tenth Circuit on March 25, 1996 denying Mr. Smith's

verified petition for rehearing, motion for an emergency stay of suspension and disbarment orders pending resolution of petition for rehearing, and suggestion for rehearing en banc.

Order issued by the disciplinary panel on November 29, 1993 indefinitely suspending Mr. Smith from the practice of law in the Tenth Circuit.

JURISDICTION

28 U.S.C. § 1254 is the statute believed to confer jurisdiction on the Supreme Court to review this case on certiorari.

CONSTITUTIONAL PROVISION AND RULE OF PROCEDURE INVOLVED IN THE CASE

The Fifth Amendment to the Constitution of the United States provides:

> . . . [N]or shall any person be . . . deprived of life, liberty, or property, without due process of law. . . .

Fed. R. App. P. 46 provides:

(a) . . . .

(b) Suspension or Disbarment.--When it is shown to the court that any member of its bar . . . has been guilty of conduct unbecoming a member of the bar of the court, the member will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why the member should not be suspended or disbarred. Upon the member's response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

(c) Disciplinary Power of the Court Over Attorneys.--A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

[Emphasis added.]

STATEMENT OF THE CASE

Initially, the disciplinary panel ordered Mr. Smith to show cause in writing why he should not be disciplined for "ghost-writing" briefs and otherwise assisting his clients with their appeals from the United States District Court for the District of Colorado to the Tenth Circuit. When Mr. Smith filed his verified response to the order to show cause stating that he had never participated in the writing of a brief for a pro se litigant without disclosing his participation, and had never refused to sign a brief that he had written when requested to do so by any court, the disciplinary panel acquitted him on the charge of "ghost-writing" the briefs in question, but ordered him to show cause in writing why he should not be disbarred

for "(1) writing briefs on behalf of third parties while under indefinite suspension, and (2) for violating this court's November 29, 1993 order."[1]

In his verified response to the second order to show cause, Mr. Smith denied the charges being brought against him by the disciplinary panel, and raised numerous defenses and mitigating circumstances. Mr. Smith requested an evidentiary hearing at which he would have the opportunity to present expert testimony and other relevant evidence in

[1]In its (November 29, 1993) order, the disciplinary panel indefinitely suspended Mr. Smith from the practice of law in the Tenth Circuit after denying his requests for an evidentiary hearing at which he would have the opportunity to present expert testimony and other relevant evidence in support of the defenses and mitigating circumstances he raised in his response to the order to show cause.

support of these defenses and mitigating circumstances.

In its (February 13, 1996) order, the disciplinary panel disbarred Mr. Smith from the practice of law in the Tenth Circuit. The disciplinary panel also denied Mr. Smith's request for an evidentiary hearing.

ARGUMENT

In the context of attorney disciplinary proceedings, as in other contexts, due process requires fair notice of the charges and an adequate opportunity to be heard prior to the entry of a final judgment. See In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976);

Cleveland Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., 908 F.2d 675 (10th Cir. 1990).

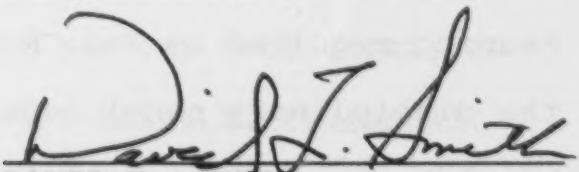
By disbarring Mr. Smith from the practice of law in the Tenth Circuit without giving him the evidentiary hearing required by Fed. R. App. P. 46, the disciplinary panel deprived him of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, without due

process of law. The disciplinary panel also so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

V. CONCLUSION

Mr. Smith requests the Supreme Court to grant his petition for a writ of certiorari, and to grant such other and further relief as may be just under the circumstances, including a reversal of the disciplinary panel's orders suspending and disbarring him from the practice of law in the Tenth Circuit.

Respectfully submitted,



DAVID L. SMITH

1630 Welton Street, #300
Denver, Colorado 80202
(303) 534-0153

PRO SE ATTORNEY-PETITIONER

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

In re: David L. Smith

APPENDIX

DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

PRO SE ATTORNEY-PETITIONER

INDEX

Order Issued by a Three-Judge Disciplinary Panel of the United States Court of Appeals for the Tenth Circuit on February 13, 1996 Disbarring Mr. Smith From the practice of law in the Tenth Circuit A-2

Order Issued by the Tenth Circuit on March 25, 1996 Denying Mr. Smith's Verified Petition for Rehearing, Motion for an Emergency Stay of Suspension and Disbarment Orders Pending Resolution of Petition for Rehearing, and Suggestion for Rehearing En Banc A-9

Order Issued by the Disciplinary Panel on November 29, 1993 Indefinitely Suspending Mr. Smith From the Practice of Law in the Tenth Circuit A-11

United States Court of Appeals
for the Tenth Circuit

In re:	)	
	)	
	)	No. 93-631
David L. Smith	)	
	)	

Order

Before Seymour, Chief Judge,
Baldock and Brorby, Circuit Judges

On December 14, 1995, this panel entered an order requiring respondent David L. Smith to show cause why he should not be disbarred for violating this court's November 1993 suspension order and for practicing in this court without authorization. On December 20, Mr. Smith filed his response. In ruling

in this matter, the court has carefully reviewed that response, as well as the other pleadings filed to date in this disciplinary action. The court has determined that Mr. Smith's transgressions warrant disbarment.

Mr. Smith's name was referred for attorney discipline after more than one panel of this court determined he was filing frivolous appeals and failing to pay court ordered sanctions. Following briefing and oral argument, this panel suspended Mr. Smith from practicing in the Tenth Circuit. In re Smith, 10 F.3d 723 (10th Cir. 1993)(per curiam), cert. denied, 115 S.Ct. 53 (1994). Approximately one year later, Mr. Smith filed a request for reinstatement. This panel denied that request. See Order Denying Reinstatement, No. 93-631, (10th Cir. July 18, 1995).

During the course of his suspension, Mr. Smith continued to file briefs in this court. In particular, the court has identified four appeals in which Mr. Smith appears to have drafted briefs on behalf of the allegedly pro se appellants. Those appeals are 94-1127, Qualls v. Regional Transportation District, 94-1130, Dunkin v. Louisiana-Pacific Corporation, 94-1317, Howard v. Mail-Well Envelope Company, and 95-1198, Seales v. Jefferson County School District R-1. The December 14 show cause order was the culmination of this court's efforts to have Mr. Smith explain his involvement in these appeals.

In his response, Mr. Smith readily admits, as he has before, that he wrote and submitted the briefs in this court following the issuance of our suspension

order. He maintains, however, that those submissions are not in violation of this court's order because he signed two of the briefs in question and included footnotes admitting his involvement in the other two. He suggests that these admissions absolve him of any allegations of "ghost-writing." See Johnson v. Board of County Commrs., 868 F. Supp. 1226, 1231-32 (D. Colo. 1994)(discussing elements of ghost-writing). The argument follows that because he admits his assistance, he cannot be subject to discipline. Mr. Smith's arguments misperceive the nature of the problem.

Mr. Smith was advised, in very clear terms, that he no longer had permission to practice law in this court. He was told he could not act as an attorney for his clients or former clients. In

writing and filing briefs on behalf of otherwise pro se litigants, he violated that order. This breach existed regardless of whether he signed the briefs or inserted footnotes. Following the suspension order, Mr. Smith was prohibited from helping his clients with their briefs.

Contrary to assertions made in the response, the court has been very careful to distinguish between efforts made on behalf of clients and Mr. Smith's right to appeal sanctions issues on his own behalf. The briefs in the four cases identified asked for relief which went far beyond Mr. Smith as an individual. In 94-1127, for example, the alleged "pro se" brief requests relief in the form of reversing the district court's dismissal of certain claims and remand for an

expedited jury trial on the merits. The front cover of that brief asserts it is being submitted by Mr. Qualls, not David Smith. We find it disingenuous for Mr. Smith to urge that these briefs only contained arguments personal to him.

Despite repeated warnings, Mr. Smith has chosen not to heed the orders of this court. He is, therefore, disbarred. His name will be stricken from the list of attorneys allowed to practice in this court. In addition, in accordance with Fed. R. App. P. 35(b), Mr. Smith's suggestion for hearing en banc was circulated to all judges of the court in regular active service. No member of the panel or the court has requested a poll. Therefore, the suggestion for en banc hearing is denied. The request for

evidentiary hearing is likewise denied. Mr. Smith is referred to the office of the Circuit Executive to file any desired judicial misconduct complaint.

Entered for the Court

Per Curiam

United States Court of Appeals
for the Tenth Circuit

In re:	)	
	)	
	)	No. 93-631
David L. Smith	)	
	)	

Order

Before Seymour, Chief Judge,
Baldock and Brorby, Circuit Judges

This matter is before the court on attorney David L. Smith's verified petition for rehearing, motion for emergency stay of suspension and disbarment orders and suggestion for rehearing en banc. The requests for an emergency stay and rehearing are denied by the original disciplinary panel.

The en banc suggestion was circulated to all the active judges of the court for their review in accordance with Federal Rule of Appellate Procedure 35(b). No member of the panel or other active judge called for a poll. Therefore, the suggestion for rehearing en banc is denied.

Entered for the Court

Patrick Fisher, Clerk

By:
Elisabeth A. Shumaker
Chief Deputy Clerk

United States Court of Appeals
for the Tenth Circuit

In re:	)	
	)	No. 93-631
David L. Smith	)	
	)	

Order

Before Seymour, Chief Judge,
Baldock and Brorby, Circuit Judges

Respondent was ordered to show cause why he should not be fined, disbarred or otherwise disciplined for filing frivolous appeals in numbers 93-1070 and 93-1139, DeHerrera v. Denver, after the entry of this court's orders in Sandlin v. Canady (In re Canady), No. 92-1169 (10th Cir. April 27, 1993) and Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 &

92-1381 (10th Cir. February 11, 1993), cert. denied, 114 S.Ct. 87 (October 4, 1993)(No. 92-1994) and for filing a frivolous appeal in Casillan v. Regional Transportation District, Nos. 92-1009 & 92-1039 (10th Cir. January 15, 1993). Respondent maintains the appeals were not frivolous. We disagree.

The appeals were found to be frivolous by the panels who decided them. We cannot overrule the judgment of another panel of this court. We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court. United States v. Killion, No. 92-3130, 1993 WL 408150 (10th Cir. October 13, 1993); United States v. Spedalieri, 910 F.2d 707, 710 n. 3 (10th Cir. 1990) (a three-judge panel cannot

overrule circuit precedent); United States v. Berryhill, 880 F.2d 275, 277 (10th Cir. 1989), cert. denied, 493 U.S. 1049 (1990).

Respondent filed a petition for certiorari in Dunkin. The question presented for review was,

> "Whether an order sanctioning counsel currently of record is immediately appealable under the collateral order exception rule established by this Court in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).
>
> Whether sanctions may be imposed against counsel for filing appeals warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law."

Petition for certiorari, attached to appellant's motion to recall and stay the mandate filed July 12, 1993, in Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993).

Certiorari was denied without comment. Dunkin and Smith v. Louisiana-Pacific Corp., ____ U.S. ____, 114 S.Ct. 87 (October 4, 1993)(No. 92-1994).

At oral argument, respondent admitted that he has not paid any of the sanctions that have been imposed on him by this court or the district court. David L. Smith is suspended from the practice of law before this court until all sanctions are paid. He may apply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied.

The clerk shall provide a copy of this order to all courts before which Mr. Smith has been admitted to practice.

Entered for the Court

Per Curiam